

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In re Applications of	)	MM Docket No. <u>88-577</u>	Federal Communications Commission Office of Secretary
	)		
LIBERTY PRODUCTIONS	)	File No. BPH-870831MI	
A LIMITED PARTNERSHIP	)		
	)		
WILLSYR COMMUNICATIONS	)	File No. BPH-870831MJ	
LIMITED PARTNERSHIP	)		
	)		
BILTMORE FOREST	)	File No. BPH-870831MK	
BROADCASTING FM, INC.	)		
	)		
SKYLAND BROADCASTING	)	File No. BPH-870831ML	
COMPANY	)		
	)		
ORION COMMUNICATIONS	)	File No. BPH-870901ME	
LIMITED	)		
	)		
For a Construction Permit for a	)		
New FM Broadcast Station on	)		
Channel 243A at Biltmore Forest,	)		
North Carolina	)		

To: The Commission

ENFORCEMENT BUREAU'S OPPOSITION TO  
JOINT REQUEST FOR APPROVAL OF SETTLEMENT

1. On November 14, 2000, Liberty Productions, a Limited Partnership ("Liberty") and Biltmore Forest Broadcasting FM, Inc. ("BFBFM") filed a "Joint Request for Approval of Settlement" ("Joint Request"). On that date, BFBFM also filed a "Memorandum in Support of Joint Request for Approval of Settlement." On November 17, 2000, Liberty filed "Liberty's Memorandum in Support of the Joint Request for Approval of Settlement." Finally, on November 20, 2000, Liberty filed a "Supplement to Joint Request for Approval of Settlement." The Enforcement Bureau ("Bureau" or "we") hereby submits its opposition to the Joint Request.

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## **Background**

2. In our February 14, 2000, pleading addressing Liberty's basic qualifications, we set forth this proceeding's lengthy history; we will not repeat it here. To better explain our position, we believe it sufficient to note only a few salient facts. First, Liberty prevailed at the auction conducted for the Biltmore Forest channel (Closed Broadcast Auction No.25) with a gross high bid of \$2,336,000.<sup>1</sup> Second, going into the auction, Liberty knew that a potentially disqualifying issue would have to be resolved in its favor before it could acquire the permit. See Order, 14 FCC Rcd 7637 (OGC 1999). Third, after the bidding concluded, BFBFM was the second highest bidder with a gross high bid of \$2,124,000,<sup>2</sup> while the next highest bidder, Orion Communications Limited ("Orion") came in with a gross high bid of \$990,000. Finally, Orion is currently operating a station on the frequency at issue here.

## **The Proposed Settlement**

3. The Joint Request proposes dismissal of Liberty's application in exchange for reimbursement of its reasonable and prudent expenses by BFBFM up to \$170,000. BFBFM also promises to pay Liberty's potential obligation to its counsel with respect to expenses incurred during the joint interim operation of the Biltmore Forest station, as well as up to \$50,000 to Cumulus Broadcasting, Inc. ("Cumulus") for interest expenses on the loan made by Cumulus to Liberty. In addition, BFBFM, should it ultimately obtain the permit, agrees to retain Liberty's principal, Ms. Valerie Klemmer Watts as a consultant. The agreements between Liberty and BFBFM are subject to several significant "contingencies." First, the Commission must

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<sup>1</sup> As explained in our February 14, 2000 pleading, we believe Liberty is not entitled to the new entrant bidding credit.

<sup>2</sup> Assuming that BFBFM is entitled to the bidding credit it claimed, BFBFM's net high bid was \$1,380,600.

determine that Liberty is not liable for any penalty for failing to fulfill its auction obligation and that it is entitled to “a full refund of its downpayment.”<sup>3</sup> Second, the Commission must declare BFBFM the auction winner by virtue of its net bid in Round 12 of the auction.<sup>4</sup>

4. Liberty and BFBFM assert their agreement serves the public interest. Specifically, they contend that their settlement will simplify this proceeding by reducing the number of parties and by avoiding further litigation over Liberty’s qualifications. In addition, Liberty and BFBFM contend this proceeding’s unique history justifies any action that will expedite its ultimate resolution. Next, the applicants assert that Liberty bid in good faith; hence, it should not be penalized monetarily and treated as a defaulting or disqualified bidder. In this regard, the applicants note that Liberty has met each obligation to date and remains ready to meet its final payment obligations if so required. Finally, Liberty and BFBFM argue that the potential loss of revenue to the Treasury should not override the other public interest benefits to be gained from approval of the proposed settlement, citing section 309(j)(7)(B) of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. § 309(j)(7)(B).

### **Discussion**

5. Review of the Joint Request indicates that Liberty and BFBFM have essentially complied with the requirements of section 73.3525 of the Commission’s rules, 47 C.F.R. §

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<sup>3</sup> In accordance with section 1.2107(b) of the Commission’s rules, 47 C.F.R. § 1.2107(b), a high bidder must submit a “down payment” sufficient to bring its total deposits up to 20 percent of its final bid. In this case, Liberty paid \$173,680 on October 25, 1999. Because the agreement does not specify the actual amount to be refunded, it is unclear whether the parties intend to include Liberty’s upfront payment of \$130,000 as part of the money to be refunded to Liberty.

<sup>4</sup> Round 12 was the last round BFBFM bid against anyone other than Liberty (see Attachment A). BFBFM’s net bid in that round was \$643,500; so was Orion’s.

73.3525, which implement section 311(c) of the Act. The Joint Request, as supplemented, includes the agreement between the parties, their declarations reflecting that Liberty will receive from BFBFM no more than Liberty's reasonable and prudent expenses,<sup>5</sup> and a public interest justification. As to this last point, the Bureau recognizes that public interest benefits may result. Settlement could well simplify this proceeding by reducing the number of parties and by terminating litigation regarding Liberty's qualifications. At the same time, however, the Bureau believes that approval of the Joint Request will result in an immediate and tangible public interest detriment and may set an undesirable precedent with respect to future post-auction settlements. Further, the benefits from the instant Joint Request appear not to be as substantial as Liberty and BFBFM suggest, since the Biltmore Forest FM station is already on the air. Consequently, the Bureau opposes the Joint Request.

6. Currently, Liberty is obligated to pay, at a minimum, a total of \$1,518,400 for the Biltmore Forest permit. That figure represents its current gross high bid of \$2,336,000, less a 35 percent discount for its claimed new entrant bidding credit. As noted earlier, however, the Bureau believes that Liberty is not entitled to that credit, with the result that, absent the current settlement, Liberty ultimately will owe the difference between its gross high bid, \$2,336,000, and the sums it has paid to date, which total \$303,680, or \$2,032,320. The Joint Request, if approved, asks that the Commission refund to Liberty at least \$173,680 (and as much as \$303,680, which represents Liberty's down payment as well as its upfront payment of \$130,000), and accept from BFBFM its Round 12 bid. As noted, that bid, taking into account BFBFM's new entrant bidding credit, totals only \$643,500. In other words, when all of the Joint Request's

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<sup>5</sup> In light of the Bureau's ultimate opposition to the Joint Request, we have not focused much attention on whether BFBFM's proposed payments to Liberty, including money to Liberty's principal, Ms. Watts, for her consulting services, strictly comply with the Commission's rules and precedent.

monetary transactions are completed, the Treasury stands to lose at least \$744,900 (the difference between Liberty's bid, including the bidding credit, and BFBFM's Round 12 bid, including its bidding credit, coupled with the refund of Liberty's down payment but not its "upfront" payment) and as much as \$1,692,500 (the difference between Liberty's bid, without the bidding credit, and BFBFM's Round 12 bid, including its bidding credit, coupled with a full refund of all sums paid by Liberty). Had Liberty and BFBFM proposed to make the Treasury whole, or if Joint Request proposed a universal settlement, the Bureau would be more amenable to supporting a settlement.<sup>6</sup> However, considering all of the circumstances, including the "take it or leave it" nature of the Joint Request, Liberty and BFBFM clearly ask too much for themselves and proffer too little in return.<sup>7</sup>

7. Liberty and BFBFM contend that this proceeding's "unique" history somehow warrants Commission approval of the Joint Request. The Bureau disagrees. In the Bureau's view, the salient facts are not what transpired before the auction but rather what occurred during and after the auction. Viewed from this perspective, the Commission now faces a winning bidder that, apparently, has changed its mind about going forward. Moreover, Liberty's about face occurred only after a series of pleadings that challenged its use of the new entrant bidding

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<sup>6</sup> In this regard, the Bureau disagrees with Liberty and BFBFM that section 309(j)(7)(B) of the Act precludes the Commission from considering the settlement's impact on the Treasury. On its face, that provision concerns considerations that govern "prescribing regulations." The issue at hand is whether approval of the instant Joint Request will serve the public interest in accordance with section 311 of the Act.

<sup>7</sup> BFBFM proposes to acquire the permit for hundreds of thousands of dollars less than it would otherwise owe upon Liberty's default or disqualification. See notes 2 and 4, *supra*, 10, *infra*, and Attachment A. BFBFM's justification for this result appears in its Memorandum, wherein it claims that it attempted to withdraw bids apparently after realizing that it had a substantial basis for attacking Liberty's qualifications. What BFBFM does not explain and cannot justify is why its realization came as late as it did. In addition, BFBFM does not explain why its Round 12 bid should be considered as the winning bid even though Orion bid the same amount in that round.

credit, demanded dismissal for failure to submit a family attribution certification,<sup>8</sup> and disagreed with its contention that it had not misrepresented the availability of its transmitter site when it submitted its construction permit application. If the instant Joint Request is granted, the Bureau believes that similar situations are likely to arise with respect to future high bidders facing meritorious petitions to deny from losing bidders. Thus, the instant Joint Request is “unique” only because it is the first of its kind, not because it is likely to be a one-time or extremely rare event.

8. By proffering the instant Joint Request, Liberty may be seeking to avoid the serious possible consequences that would befall it should the Commission disqualify it. Those consequences include imposition of substantial costs prescribed by the Commission’s rules for bidders who default or who are disqualified.<sup>9</sup> The Bureau submits that if Liberty can escape unscathed in these circumstances, it will open the door to all broadcast bidders who, in the future, wish to avoid penalties that could apply should they default or be disqualified.<sup>10</sup> To avoid that fate, such applicants could gamble that losing bidders would not file meritorious petitions to deny, knowing that if such petitions were filed, they could avoid substantial penalties merely by dismissing their applications pursuant to a settlement agreement. The Bureau believes that

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<sup>8</sup> With respect to this certification, BFBFM argues, essentially, that Liberty should be allowed to withdraw from the auction because the Commission’s staff should never have allowed Liberty to participate in the first place. We disagree, and note that in our February 14, 2000, pleading, we explained why Liberty’s participation in the auction was proper.

<sup>9</sup> See 47 C.F.R. §§ 1.2104(g), 1.2109(c) and 73.5004.

<sup>10</sup> In this regard, Liberty notes that the Commission provided an amnesty option to various C Block winning bidders who turned in their licenses for re-auction. With respect to the Biltmore Forest permit, however, no re-auction is possible. Should Liberty default or be disqualified, the permit would be offered to BFBFM, as the next highest bidder, at its final bid. See Amendment of Parts 1, 73 and 74 – Competitive Bidding, 13 FCC Rcd 15920, 15956-57 (¶ 100) (1998), *recon. granted in part and denied in part*, 14 FCC Rcd 8724 (1999).

allowing questionable applicants to escape without penalty will ultimately do far more damage to the integrity of the auction process than to deny the instant Joint Request. Thus, as a general matter, we believe that a winning bidder should not be able to avoid its obligations merely by entering into a settlement agreement. Rather, any settlements should take into account what the parties would otherwise owe in the absence of any such agreements.<sup>11</sup> In any event, however, the Bureau reiterates its belief, as set forth in its February 14, 2000, pleading, that Liberty is qualified. Thus, denial of the instant Joint Request should mean no more than that Liberty is returned to the situation as it existed prior to the submission of the Joint Request.

9. Finally, the asserted benefits that offset the detriments noted above are simply too insignificant. In this regard, the Bureau and the other parties in this proceeding have already expended considerable resources analyzing the record to determine whether Liberty misrepresented the availability of its initial transmitter site. From here on, the parties are apt to do little more than repeat what they have already advocated relative to that matter. Likewise, given the amount of time that has passed since the last pleading on the Liberty false certification issue was submitted, it is more than likely that the Commission itself has expended resources by reviewing the parties' submissions and the underlying record in an effort to resolve the matter. Thus, even though any decision relative to Liberty could indeed result in additional proceedings, it is by no means clear that significant public resources will be expended in the process. On the other hand, should it no longer be necessary to consider Liberty's qualifications, it is just as conceivable that the Bureau and the remaining parties will have to turn their attention to BFBFM's qualifications. In this regard, BFBFM has candidly acknowledged that the presiding judge in this proceeding indicated that, had he not disqualified BFBFM for not having a site, he

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<sup>11</sup> Thus, an appropriate settlement agreement involving BFBFM would recognize that its obligation was, at least, its net high bid of \$1,380,600, not its proffered \$643,500.

would have added a misrepresentation issue. Thus, approval of the Joint Request will not necessarily lead to a quick end to this proceeding. On the contrary, approval of the Joint Request is likely to result in new and different litigation focusing on BFBFM.

### **Conclusion**

10. For the reasons stated, the Bureau opposes approval of the Joint Request. The possible benefits from such an action are simply too insignificant to offset the direct and tangible loss the Treasury will suffer, as well as the likely damage to the auction process, and the likelihood of litigation concerning BFBFM's qualifications.

Respectfully submitted,  
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December 5, 2000



**ATTACHMENT A**

<b>ROUND</b>	<b>BIDDER</b>	<b>DATE</b>	<b>TIME</b>	<b>GROSS</b>	<b>NET</b>
12	BFBFM	10/1/99	15:30	990,000	643,500
12	ORION	10/1/99	15:36	990,000	643,500
13	LIBERTY	10/4/99	13:31	1,089,000	707,850
15	BFBFM	10/5/99	9:00	1,198,000	778,700
16	LIBERTY	10/5/99	11:36	1,318,000	856,700
17	BFBFM	10/5/99	14:11	1,450,000	942,500
19	LIBERTY	10/6/99	9:02	1,595,000	1,036,750
20	BFBFM	10/6/99	11:01	1,755,000	1,140,750
25	LIBERTY	10/7/99	11:17	1,931,000	1,255,150
26	BFBFM	10/7/99	14:07	2,124,000	1,380,600
27	LIBERTY	10/7/99	15:11	2,336,000	1,518,400

CERTIFICATE OF SERVICE

Karen Richardson, secretary of the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 5th day of December, 2000, sent by first class United States mail copies of the foregoing "Enforcement Bureau's Opposition to Joint Request for Approval of Settlement" to:

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